IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6780

JOHN McILWAIN

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

A. FRANKLIN BURGESS, JR.

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May 20, 1983

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, John McIlwain, respectfully moves, pursuant to Rule 46 of the Rules of this Court for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. As grounds for this request, petitioner asserts:

1. Petitioner is filing this 20 day of May, 1983, a petition for writ of certiorari to review the judgment and opinion of the District of Columbia Court of Appeals, which affirmed his conviction of second degree burglary while armed in the Criminal Division, Felony Branch of the Superior Court of the District of Columbia.

2. Counsel was appointed to represent the petitioner in the Superior Court and in the Court of Appeals under the District of Columbia Criminal Justice Act, 11 D.C. Code §2601 et seq.

3. Because of his poverty, petitioner is unable to pay for the costs of this case and is unable to give security for the same.

4. The petition that is attached seeks review of the decision of the District of Columbia Court of Appeals that affirmed his convictions over his claim that the presence of an intoxicated juror in his deliberating jury denied him his right to trial by an impartial jury and to due process of law.

WHEREFORE, for these reasons, petitioner respectfully requests leave to proceed in forma pauperis.

Respectfully submitted,

A. FRANKLIN BURGESS, JR.
Public Defender Service
451 Indiana Avenue, N.W.
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(202) 628-1200

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of Petitioner's Motion for Leave to Proceed In Forma Pauperis has been served by mail upon the Honorable Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, and on Michael W. Farrell, Chief, Appellate Division, United States Attorney's Office for the District of Columbia, this 20 day of May, 1983.

A. FRANKLIN BURGESS, JR.

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PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, John McIlwain, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on December 29, 1982.

QUESTION PRESENTED

Was petitioner denied his right to a trial by an impartial jury and his right to due process of law when the trial judge failed to declare a mistrial after determining that one juror was so intoxicated that she was incapable of deliberating?

OPINION BELOW

The judgment of the Court of Appeals is reported at 454 A.2d 770 (D.C. 1982). A copy of the opinion is reproduced, infra. (App. A, infra.). The Superior Court of the District of Columbia issued no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1982. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 30, 1982. (Appendix B.) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be deprived of life, liberty, or property without due process of law . . . .

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . .

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STATEMENT OF THE CASE

A. Introduction

Petitioner John McIlwain and two co-defendants were charged in the Superior Court of the District of Columbia with robbing Allen Danneman and Lori Greenstein while armed with a pistol, in violation of 22 D.C. Code §§2901 and 3202, and with entering the offices of A.D.E., Inc., with the intent to steal, and while armed with a pistol, in violation of 22 D.C. Code §§1801(b) and 3202. On July 31, 1981, a Friday, following a week of trial, the trial court was informed that one of the jurors was intoxicated. A voir dire revealed that nine jurors believed that the foreperson was intoxicated during jury deliberations. Petitioner moved for a mistrial on the ground that the jurors was "not competent as a juror." The trial court denied the mistrial motion, and declared recess because it was not appropriate, in light of the juror's condition, to permit deliberations to continue. On August 3, 1981, a Monday, proceedings resumed and the jury returned verdicts against all defendants of not guilty with respect to the two charges of armed robbery, and guilty with respect to the charge of second degree burglary while armed. Appellant was sentenced to a term of imprisonment of from ten to thirty years.

He appealed, raising as one issue the denial of his constitutional right to trial by twelve competent, impartial jurors. The District of Columbia Court of Appeals affirmed. Petitioner's petition for rehearing and suggestion of rehearing en banc were denied.

B. The Evidence At Trial

The government alleged that on December 18, 1980, petitioner and his co-defendants, Alvin Hines and Larry Lee, 1/

1/ A fourth defendant, Yvette Rollins, was charged as an accessory after the fact. She was ultimately acquitted of that offense.

entered the offices of A.D.E., Inc., a business which bought and sold second-hand jewelry and precious metals. They allegedly robbed the proprietor, Allen Danneman, and his secretary, Lori Greenstein, of a substantial quantity of cash, jewelry, and other property. The defendants, for their part, did not contest the fact that they had gone to A.D.E. on the date in question and removed the property. They defended on the ground that Danneman, with Greenstein's knowledge and participation, had hired them to stage a phony robbery of his business in order to defraud his insurance company. They also claimed that Danneman was knowingly trafficking in stolen goods and that A.D.E. was, in fact, an illegal enterprise.

1. The Government's Case

Allen Danneman, the owner of A.D.E., never testified at trial. According to the prosecutor's representations and the testimony of other witnesses, Danneman was arrested shortly after the alleged robbery and was, at the time of trial, the subject of ongoing investigation by a federal grand jury. (Tr. I at 236).2/ On the record, but out of the presence of the jury, Danneman informed the Court that he would assert his Fifth Amendment privilege if called as a witness by either side, and would refuse to answer any and all questions about the alleged robbery. (Tr. II at 900-905).

2/ The references in the transcript are to the record on appeal, designated as follows:

1. Tr. I - Transcript of trial proceedings from July 23, 1981 to July 29, 1981.

   Tr. II - Transcript of trial proceedings from July 29, 1981 to July 31, 1981.

   Tr. III - Transcript of post-trial proceedings on August 3, 1981.

In Danneman's absence, the government presented its case principally through the testimony of Lori Greenstein, a former employee of A.D.E. and the only eyewitness to the alleged offense aside from Danneman himself.

Before launching into the substance of her testimony on direct examination, Greenstein told the jury that her former boss, Danneman, and his company, A.D.E., were under investigation by federal authorities. She herself had been questioned in connection with the investigation and had initially invoked her Fifth Amendment privilege to remain silent. Only after she was granted complete immunity did she agree to cooperate with the government. (Tr. I at 356-357; 453-454; 485).

Greenstein testified that at about 11:00 on the morning of December 18, 1980, two men appeared in the A.D.E. offices and asked to see Danneman, whom they referred to as "Big Al." The men claimed they had some merchandise to sell. (Tr. I at 358).

Greenstein directed one of the men to Danneman's office and asked the other to wait in the reception area where her desk was located. A few moments later, the man in the reception area pulled a gun on Greenstein and demanded that she open the safe in an adjoining office. Greenstein informed the gunman that the safe contained only papers. She then volunteered to open another safe which, she said, contained money, jewelry, and other valuables. (Tr. I at 358-363). The man then forced her to fill a large trash bag with property from the safe, but the full bag proved too heavy to carry so the gunman transferred some of the loot to his pockets. (Tr. I at 363-364).

Greenstein was then forced into Danneman's office where she saw Danneman lying on the floor, his wrists and ankles bound with duct tape. Greenstein was told to lie down beside him. Before she could comply, however, the door bell sounded and the robbers directed her to show them how to operate the buzzer system that enabled outsiders to enter the suite. She did so,

and a third man, whose face she never saw, entered the office. (Tr. I at 365-367; 378-379). Greenstein was then returned to Danneman's office and forced to lie on the floor. She, too, was tied up with duct tape. (Tr. I at 366).

"Within seconds" after the robbers left the office, Greenstein freed herself and Danneman, and Danneman called the police. (Tr. I at 367, 452). An inspection of the premises revealed that the robbers had left a great deal of money and jewelry behind. For instance, a cash box in Greenstein's desk containing one or two thousand dollars had not even been touched. (Tr. I at 372; 388-389).

Several hours after the robbery, police asked Greenstein to look at petitioner, Lee and Hines, who had all been arrested that afternoon. She positively identified Lee as the man who had first pulled a gun on her. She also identified Lee in the courtroom, but did not identify petitioner or Alvin Hines. (Tr. I at 379-380; 429-430). Indeed, she expressly stated at trial that she did not recognize either one of them. (Tr. I at 472).

On cross-examination, Greenstein admitted that there were three silent burglar alarms in the A.D.E. offices. No one had activated any of them even though one was in Danneman's office, and another was concealed in her own desk. (Tr. I at 442-444).

In response to a question about the amount of money taken in the robbery, Greenstein initially stated that it was between five and ten thousand dollars. (Tr. I at 454). She was then impeached with her sworn grand jury testimony, and she admitted that she had told the grand jurors that the loss came closer to fifty thousand dollars. (Tr. I at 455; 501-504). In apparent conflict with that earlier testimony of Greenstein's, the police had seized only about six thousand dollars from the defendants at the time of their arrest and believed they had recovered all the property. (Tr. I at 565-567).

Greenstein testified that she did not "know for a fact" that Danneman was trafficking in stolen goods. She suspected that he was and that much of the merchandise A.D.E. purchased was stolen. (Tr. I at 493). She also admitted that she occasionally signalled to A.D.E. customers to alert them to the presence of the police on the premises. (Tr. I at 490-492).

A second government witness, Ron Berman, testified that he worked down the hall from A.D.E. at 1411 K Street, N.W. At about 11:00 a.m. on December 18, 1980, Berman was waiting for an elevator on the seventh floor of the building. As he stood there, he saw a man suspiciously come in and out of a door that led to the central stairwell. (Tr. I at 297-301). Later that day, the police asked him to look at petitioner, Hines and Lee. He positively identified Hines as the man he had seen in the building earlier that day but did not identify petitioner or Lee. (Tr. I at 303).

Richard Lee testified that he was walking toward McPherson Square on the morning of December 18, 1980 when he saw three individuals getting into a yellow Mustang on Vermont Avenue. He thought the men suspicious and noted the license plate number on their car. (Tr. I at 508-510). A short time later, police began converging on the scene, and Richard Lee gave them this information. (Tr. I at 510-511). A radio run incorporating his description of the car and its tag numbers was quickly broadcast.

A host of police officers testified to the facts surrounding the arrest of the three defendants. Officer William Noaker told the jury that he was returning to the Third District when he heard the radio run and observed the yellow Mustang parked in the 1700 block of Seaton Place, N.W. (Tr. I at 318-320). Officers Zogran and Schrum, along with their partners, set up a surveillance of the car from either end of Seaton Place. After a wait of approximately 45 minutes, a man and two women, identified at trial as Alvin Hines and Yvette and Vanessa Rollins,

approached the car. The Rollins sisters got into the car and began driving eastward toward 17th Street. Alvin Hines stayed behind on the sidewalk. At the corner of 17th Street and Seaton Place, numerous police officers forced the car to stop. (Tr. I at 323-329; 515-518). Other police approached Hines. He then dropped his coat and a paper bag to the ground. The bag contained jewelry, and the coat contained jewelry and an imitation starter pistol. The police found about $6,000 in cash on Hines' person. (Tr. I at 329-331; 518-522). At trial, a videotape of Hines' arrest was played for the jury. (Tr. I at 521).

Hines and the Rollins sisters had been observed coming out of 1743 Seaton Place, N.W. The police then surrounded the house, and they eventually learned that two other men, petitioner and Larry Lee, were still inside. A police negotiator, Officer Henry Cole, was called in to negotiate their surrender. Cole placed three telephone calls to 1743 Seaton Place, each of which was tape recorded and played for the jury at trial. (Tr. I at 667-675). After the third call, Lee and petitioner came out of the house and were arrested. A videotape of their arrest was also played for the jury. (Tr. I at 676-678).

After the arrest of petitioner and Larry Lee, the house at 1743 Seaton Place was searched from top to bottom. Numerous pieces of jewelry were inside, and Lori Greenstein identified many of them as A.D.E.'s. (Tr. I at 626-651).

Detective Bobby Stanford testified that he arrived at A.D.E. shortly after the robbery and interviewed Danneman and Greenstein. They informed him that $54,000 in one hundred dollar bills had been taken in the course of the robbery. The police conducted a thorough search but never found any such sum. The only money recovered was the $6,000 seized from Hines at the time of his arrest. (Tr. I at 565-567).

2. <u>The Defense Case</u>

Larry Lee testified that he first met Allen Danneman through Joseph Martin, one of Danneman's associates.

(Tr. II at 780). Lee approached Martin, another dealer in second-hand jewelry and precious metals, with two rings which he wanted to sell. Martin was not interested but suggested that his associate, Danneman, might be. Danneman ultimately purchased the rings from Lee and encouraged him to bring in more jewelry. (Tr. II at 780-781; 802-804).

At this first meeting, Lee acknowledged to Danneman that he had a criminal record. Undisturbed by this revelation, Danneman gave Lee two of his business cards. He also took down Lee's telephone number and suggested that they keep in touch. (Tr. II at 782-783; 811).

In early December of 1980, Lee returned to A.D.E. with appellant and Alvin Hines. Danneman offered to pay the three men $2,000 apiece plus a quantity of jewelry if they would stage a sham robbery of Danneman's business. (Tr. II at 784-786). Although the purpose of the hoax was not spelled out, Danneman implied that an insurance fraud was contemplated. Lori Greenstein was present during the conversation and participated in planning the "robbery." (Tr. II at 786-787; 818).

On December 18, 1980, Lee drove to A.D.E. with petitioner and Hines. Greenstein gave them the objects that Danneman wanted removed from the premises. She also "paid" them $6,000, the compensation they had previously agreed on. No other money was taken from A.D.E., nor were any weapons ever displayed. (Tr. II at 795; 824; 830-831). However, Danneman and Greenstein were tied up with tape in order to create the appearance that they had been forcibly robbed. (Tr. II at 797).

When the police converged on 1743 Seaton Place after the "robbery," Lee was "shocked." (Tr. II at 789). He could not understand how the police had become involved since the robbery was staged and the property taken with Danneman's consent. Nevertheless, Lee was reluctant to surrender because he knew that he and his friends had become involved in a fraud. (Tr. II

Kendale Shull, a special agent for the F.B.I., testified on behalf of the defense that he was assigned, in connection with his duties, to investigate A.D.E. As part of his investigation, he obtained a job at A.D.E. in November 1980 under an assumed name. (Tr. II at 880-884). Shull was not working at A.D.E. on the day of the alleged robbery and was therefore unable to shed any light on that event. (Tr. II at 884-885). Nonetheless, it was apparent from his testimony that A.D.E. was an illegal enterprise and that Danneman's real business was the purchase and sale of stolen goods.

C. The Intoxicated Juror

On July 30, 1981, testimony was completed and the case argued and submitted to the jury. At 5:00, after approximately an hour's deliberation, the jurors were excused for the day and instructed to reassemble in the jury room by 9:15 the next morning.

The following morning, an anonymous person telephoned the trial judge's chambers to say that one of the jurors, Number 323, would be late for Court. (Tr. II at 1089).

At approximately 10:20 a.m., the judge received a note from the jury which stated, "We would like to change the fore-person of the jury due to the fact that the present foreperson seems somewhat unable to preside this morning."

Counsel were promptly assembled in the courtroom and discussions about how best to handle the situation commenced. In the midst of these discussions, the Court informed counsel that he had heard from the marshal guarding the jury that there might be a question as to whether Juror 323 was intoxicated. (Tr. II at 1091). A decision was quickly made to question Juror 323, a woman named Kelley, out of the presence of the other jurors.

Juror Kelley informed the Court that she had arrived late that morning and had discovered , upon her arrival, that a new

foreperson had already been selected. She insisted that she did not feel ill and flatly denied that she had been drinking. (Tr. II at 1095). But some of her responses were patently incoherent. For instance, when asked whether she thought she was able to deliberate that morning, Juror Kelley replied, "I couldn't deliberate faster than the other person could, since the other person is just left alone." (Tr. II at 1095).

After questioning Juror Kelley, the judge proceeded to question personally each of the remaining jurors in turn. When asked why the members of the jury thought it necessary to replace their foreperson, nine of the jurors stated unequivocally that Juror Kelley was intoxicated:

> JUROR CURLEY: I will tell it like it is. It seems like she is a little intoxicated.
> (Tr. II at 1107).
>
> JUROR FRAZIER: As far as I am concerned, she had been drinking this morning, Your Honor.
> (Tr. II at 1109).
>
> JUROR TYSON: She is not herself. She is just talking a lot . . . I assume she is under the influence of some kind.
> (Tr. II at 1111).
>
> JUROR FORD: I thought she was incompetent to preside because of the fact that she was a little intoxicated.
> (Tr. II at 1112).
>
> JUROR FLYNN: She did look like she was under the influence of alcohol . . . This person, I do not think she should be a juror on this this morning.
> (Tr. II at 1114-1115).
>
> JUROR JACKSON: She seemed to be under the influence of alcohol, sir . . . I think she still is a little intoxicated, unreasonable.
> (Tr. II at 1116).
>
> JUROR WATSON: Well, it seemed like she had been drinking and she wouldn't let anyone else talk; just difficult to accomplish anything.
> (Tr. II at 1117).
>
> JUROR HUNTER: To my knowledge I think she had just a little too much to drink to be in this position that we are in.
> (Tr. II at 1104).
>
> JUROR WALL: She is drunk.
> (Tr. II at 1102).

All eleven jurors stated, in response to the Court's questions, that Juror Kelley had been loud and disruptive and would not allow anyone else to speak. Her actions, they said, rendered their efforts to discuss the case futile.

Several, but not all, of the jurors were asked whether they had reason to believe that Kelley had been drinking prior to July 31. Most stated in response that their attention had not been focused on Juror Kelley during the trial. But one juror responded affirmatively:

> THE COURT: She seems intoxicated?
>
> JUROR FORD: Yes.
>
> THE COURT: Was there any indication of that prior to this morning?
>
> JUROR FORD: Yes, sir.
>
> THE COURT: You mean during the course of the trial or what?
>
> JUROR FORD: Yes, sir.
>
> THE COURT: In other words, she was selected as the foreperson yesterday, I take it --
>
> JUROR FORD: Well, she volunteered to be the foreperson and since we felt since she had been on jury duty before that we would take a chance on her being the foreperson.
>
> THE COURT: Did the deliberations proceed orderly yesterday afternoon?
>
> JUROR FORD: No.
>
> THE COURT: Do you feel there is some indication of drinking on the part of that juror during the course of the trial?
>
> JUROR FORD: I do.
>
> THE COURT: All right. Thank you, sir. Please don't discuss this with any other juror. (Tr. II at 1112-113).

A juror named Flynn was asked whether Kelley had appeared intoxicated the previous afternoon, when deliberations began. She replied, "I would say probably so." (Tr. II at 1114).

The Court did not ask Ford or Flynn to state the basis for his or her conclusions. But petitioner's counsel was able to inform the Court:

> My observation is that her speech is somewhat slurred and I also know that this has been drawn to my attention, noticed during the trial. There were times when I saw her holding her head like she had a headache and a couple of times she sat back with her eyes closed. For a momentary period she appeared to be asleep. I noticed that during the trial.
>
> (Tr. II at 1127-1128).

At the conclusion of the voir dire, petitioners' counsel moved for a mistrial, stating that Kelley "has already demonstrated that she is not competent as a juror." (Tr. II at 1122). The trial court concluded that the juror was "somewhat under the influence in a fashion . . . that makes deliberations . . . inappropriate at this time." (Tr. II at 119). Despite this conclusion, he denied the motion for a mistrial. The jury reconvened on Monday and deliberated until it reached a verdict.

On appeal, the Court of Appeals affirmed. Although it assumed the correctness of the trial court's conclusion that Juror Kelley was so intoxicated that deliberations should not continue, it found no prejudice to the petitioner. 454 A.2d at 774.

This petition followed.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT BECAUSE, IN CONCLUDING THAT PETITIONER WAS NOT PREJUDICED EVEN THOUGH ONE JUROR WAS SO INTOXICATED THAT SHE WAS INCAPABLE OF DELIBERATING, THE COURT OF APPEALS DEPARTED FROM THE PRECEDENTS OF THIS COURT AND THE LOWER COURTS.

The Sixth Amendment to the United States Constitution guarantees to the accused the right to a trial "by an impartial jury." The Fifth Amendment prohibits deprivation "of life, liberty or property, without due process of law." The issue presented in this petition is whether under either of these constitutional provisions an accused can be convicted after deliberations during which a juror was so intoxicated that she was incapable of deliberating.

Only last term, this Court stated:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Smith v. Phillips, 102 S. Ct. 940, 946 (1982). The dissent in that case expressed the same basic principle when it stated that "[f]airness and reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial." Id. at 950 (Marshall, J., dissenting).

While most of this court's cases on the subject of juror impartiality have concerned potential or actual bias of some or all of the jurors, it is clear that the due process guarantee and the Sixth Amendment right to an impartial jury are not limited to that form of "impartiality." Impartiality is, after all, a "state of mind[,]...[a] mental attitude of appropriate indifference [for which] the Constitution lays down no particular tests...." Dennis v. United States, 339 U.S. 162, 172 (1950), quoting United States v. Wood, 299 U.S. 145, 146 (1936). Thus, this Court has established that the due process clause of the Fourteenth Amendment forbids trial of a defendant by an insane juror. Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

See Peters v. Kiff, 407 U.S. 493, 501 (1972); Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980). Where a juror, though not insane, is so intoxicated that she is not "capable" of deciding the case on the evidence before her, she is no different than the insane juror. Due process therefore demands that a verdict must be set aside if it was reached during deliberations in which a juror was so intoxicated that he was incapable of actually deliberating.

There is no question in this case that, for part of the deliberations, one of petitioner's jurors was so intoxicated that she was incapable of deliberating. Nine jurors told the trial court that Juror Kelley was intoxicated during deliberations. She was so intoxicated that she was "not herself" (Juror Tyson) and "incompetent to preside" (Juror Ford). Juror Flynn said that she was "under the influence of alcohol" and, in his opinion, "should [not] be a juror on this this morning." She was "unreasonable" (Juror Jackson); she "wouldn't let anyone else talk" and made it "difficult to accomplish anything" (Juror Watson). In sum, "she had just a little too much to drink to be in this position we are in" (Juror Hunter).

On these facts, the trial court could have done nothing else but conclude, as it did, that Juror Kelley was intoxicated enough to "make[ ] deliberations...inappropriate at this time." (Tr. II at 119.) The Court of Appeals accepted this conclusion as a premise for its opinion. 454 A.2d at 773 n.1. Hence, petitioner's conviction was affirmed despite the fact that during approximately an hour of juror deliberations--at the

least 3/--one juror was incapable of deciding petitioner's case solely on the evidence.

In affirming the conviction, the Court of Appeals held that there was no prejudice to the defendant. 454 A.2d at 774. We do not quarrel that prejudice must be shown; this Court so held in Smith v. Phillips, supra, 102 S. Ct. at 944-946. But the Court of Appeals seriously erred in its definition of "prejudice." This Court made clear in Smith that prejudice, in a bias case, means "actual bias," as contrasted to presumptive bias. Id. at 945, 946. In Smith, a hearing conducted under the mandate of Remmer v. United Stater, 347 U.S. 227 (1954), determined that the juror alleged to be biased was not in fact biased. Hence, there was no prejudice. Quite the opposite occurred in this case. The juror alleged to be so intoxicated that she could not deliberate was in fact found to be incapable of deliberating. Actual incompetence was established. The Federal Courts of Appeal and the state courts of appeal are in accord that, when a juror is alleged to be intoxicated, the test for determining whether a new trial should be granted is whether the juror was so intoxicated that he or she lacks the capability to function as a juror--i.e., evaluate the evidence.4/ Thus, under the decisions not only of this Court but also of the federal and state courts, a new trial should have been granted.

The Court of Appeals ignored all these precedents in establishing a new test for "prejudice." It found that it was "doubtful that any significant deliberations occurred on Friday

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3/ This is not to mention the evidence from two jurors that Juror Kelley had been intoxicated during deliberations the day before, and from one that she was intoxicated during trial itself.

4/ E.g., United States v. Provenzano, 620 F.2d 985, 997 (3d. Cir.), cert. denied,449 U.S. 899 (1980); United States v. Taliaferro, 558 F.2d 724, 726 (4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978); State v. Hall, 235 N.W.2d 702, 730 (Iowa 1975); Keoloha v. Tanaka, 45 Haw. 457, 370 P.2d 468, 475-477 (1962); Curtis v. Grifall, 84 Nev. 375, 441 P.2d 680, 681 (1968). The Court of Appeals cited Provenzano and Taliaferro as support for its holding that prejudice must be shown, 454 A.2d at 773 n.2, but then misapplied the test for

morning" because of the appearance that the jurors focused on selecting a new foreperson. 454 A.2d at 774. That assertion is simply not borne out by the record, which discloses that the jurors had already selected a new foreperson by the time Juror Kelley arrived. (Tr. II at 1095.) What the record discloses, in fact, is that the juror was so intoxicated that the jury could accomplish nothing, because Juror Kelley would not stop talking, and would let no one else talk. The jury simply could not deliberate because Juror Kelley was incapable of deliberating. This is the essence of a denial of due process.

This Court has never established as a test for prejudice whether the juror was biased or incompetent during "significant" deliberations. It has never held that if a juror is biased during only a portion of deliberations, which an appellate court deems "insignificant," there is no prejudice. It could not so hold, because there is no way of knowing what part of deliberations are significant or not. In the present case, it was not and could not be determined how Juror Kelley's incapacity to deliberate affected her verdict, for the juror was so drunk that she was not in a position even to evaluate what mental processes she underwent during that hour, more-or-less, of deliberations. Moreover, it could not be determined what opinions Juror Kelley or any other juror formed during that hour of deliberations, and whether those opinions influenced the final verdict.

The Court of Appeals also noted that "only one juror was involved." 454 A.2d at 774. This, too, is a radical departure from precedent, for it is well established that even if only one juror is improperly influenced or biased, the right to an impartial jury is denied. United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977); Tillman v. United States, 406 F.2d 930, 937 (5th Cir.), vacated on other grounds, 395 U.S. 830 (1960); Styler v. State, 417 A.2d 948, 951-952 (Del. 1980);

Commonwealth v. Cornitcher, 447 Pa. 539, 291 A.2d 521, 527 (1972).

The Court of Appeals stated that "[t]here is no evidence that any drinking actually occurred...during trial." Id. at 774. In fact there was such evidence, from two jurors. (Tr. II at 1112-1113-1114.) In any event, however, the Due Process Clause and the Sixth Amendment do not permit a defendant to be convicted by a juror who was drunk during deliberations, so long as the government can establish that he was not drinking during the course of trial.

The Court of Appeals stated that "[t]here is no evidence that drinking actually occurred in the jury room...." 454 A.2d at 774. Where it is shown that a juror actually was so intoxicated that she was incapable of deliberating, it cannot be a material fact under the Fifth or the Sixth Amendment that the juror becomes drunk before entering the jury room, rather than afterwards. In either case, she is incapable of deliberating.

Finally, the Court of Appeals stated that "the jury foreperson was not conclusively shown to have been intoxicated at the time of the voir dire." 454 A.2d at 774. Whether or not intoxication was "conclusively" shown, the trial judge concluded that the juror was so "under the influence" that deliberations were "inappropriate," and the Court of Appeals assumed the correctness of that conclusion. 454 A.2d at 773 n.1. The evidence from nine of twelve jurors was overwhelming that Juror Kelley was drunk, and the trial court, based on that evidence and on its own observations, would not let the jury continue to deliberate. This was surely a case of juror intoxication.

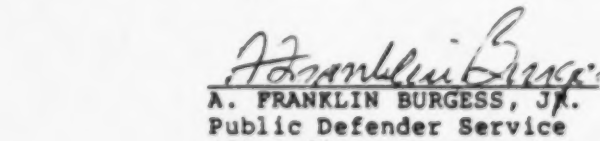
The decision of the Court of Appeals thus permits a jury verdict to stand even though one of the jurors was so intoxicated that she was not "capable and willing to decide the case solely on the evidence." Smith v. Phillips, supra, 102 S. Ct. at 946. In reaching its decision, the Court of Appeals applies

a test for "prejudice" that conflicts with this Court's decisions and with those of the federal and state courts. The test used below purports to assess a number of factors, none of which point to anything except what can at most be a hunch that nothing happened during an hour of deliberations that unfairly hurt the defendant. But the Constitution does not demand that a defendant show that a drunk juror would have acquitted the defendant if he had not been drunk. It does not parse what deliberations are "significant or not." It does not demand that a defendant demonstrate that, because of her intoxication, the juror said this thing or that thing, or thought this or that thought, which meant a difference in the outcome. The Constitution guarantees that when the jurors deliberate on a defendant's guilt or innocence, they be competent to deliberate. Since one juror was not competent to deliberate, the petitioner was denied a fair trial.

Conclusion

For the foregoing reasons, this petition should be granted.

Respectfully submitted,



A. FRANKLIN BURGESS, JR.
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

APPENDIX A

Larry T. LEE, Appellant,

v.

UNITED STATES, Appellee.

Alvin C. HINES, Appellant,

v.

UNITED STATES, Appellee.

John P. McILWAIN, Jr., Appellant,

v.

UNITED STATES, Appellee.

Nos. 81-1300, 81-1379 and 81-1390.

District of Columbia Court of Appeals.

Argued Oct. 6, 1982.

Decided Dec. 29, 1982.

Defendants were convicted before the Superior Court, District of Columbia, Fred B. Ugast, J., of second-degree burglary while armed, and they appealed. The Court of Appeals, Kern, J., held that: (1) apparent insobriety of jury foreperson was not shown to be prejudicial so as to warrant mistrial; (2) trial judge's failure, sua sponte, to conduct a more detailed inquiry, in regard to foreperson's insobriety, was not error; (3) in such proceeding in which defendants contended that operator and employee of the burglarized jewelry business offices had hired defendants to stage a robbery as part of insurance fraud scheme, refusal to admit evidence that operator and employee were the focus of federal criminal investigation for racketeering and "fencing" stolen goods was not abuse of discretion; (4) admission of tape recording of prearrest negotiations and videotape of arrest scene was not abuse of discretion; and (5) even if Government's failure to disclose tape recording and videotape to defense counsel in advance of trial violated discovery rule, such violation would not have rendered admission of the tapes an abuse of discretion.

Affirmed.

1. Criminal Law ⇐855(2)

Insobriety of a juror does not warrant a mistrial unless there is a showing of prejudice.

2. Criminal Law ⇐855(2)

In criminal proceeding, apparent insobriety of jury foreperson on one morning was not shown to be prejudicial so as to warrant mistrial under circumstances in which only a short period of deliberations was called into question, in which there was no indication that any drinking actually occurred in juryroom or during course of the trial, in which foreperson was not conclusively shown to be intoxicated and in which judge called three-day recess and subsequently determined that foreperson was sober before judge permitted resumption of deliberations.

3. Criminal Law ⇐868

In criminal proceeding in which the judge, in conducting a voir dire after he was informed that jury foreperson might have been intoxicated, had questioned foreperson directly concerning her capacity to deliberate, had asked the other jurors whether they believed foreperson was experiencing any problems, such as drinking, that interfered with her capacity to function as juror and had consulted with counsel both before and after the voir dire, the failure, sua sponte, to conduct a more detailed inquiry was not error.

4. Criminal Law ⇐369.1

Generally, admission of evidence of other crimes or misconduct to prove character of a person to show that he acted in conformity therewith on the occasion in question is disfavored.

5. Witnesses ⇐344(2)

Though evidence of prior misconduct of accused may be introduced for certain limited purposes, such as to establish motive or intent, a witness other than accused may be asked about prior misconduct, not amounting to a criminal conviction, only if it bears directly upon veracity of the witness as to

the issues involved in the trial, even under these circumstances, trial judge must balance the prejudicial effect of the proffered evidence against its probative value in determining whether to admit it.

6. Criminal Law ⇐1153(4)
Witnesses ⇐344(2)

Trial court, within its discretion, may exclude evidence of a witness' prior misconduct, not amounting to a criminal conviction, if it appears that the danger of unfair prejudice will outweigh its probative value, and that determination is reversible only for abuse of discretion.

7. Criminal Law ⇐359

In proceeding in which defendants were convicted of second-degree burglary of jewelry business offices while armed, and in which they contended that operator of the business and employee had hired defendants to stage a robbery as part of insurance fraud scheme, refusal to admit evidence that operator and employee were the focus of federal criminal investigation for racketeering and "fencing" stolen goods was not abuse of discretion, in view of fact that prejudicial impact of such evidence would have been substantial and that its probative value would not have been great. D.C.Code 1981, §§ 22–1801, 22–3202.

8. Burglary ⇐41(1)

Evidence, including circumstantial evidence linking a defendant to the events occurring in jewelry business offices on date in question, was sufficient to sustain his conviction of second-degree burglary of such offices while armed. D.C.Code 1981, §§ 22–1801, 22–3202.

9. Criminal Law ⇐404(4)

In proceeding in which defendants were convicted of second-degree burglary of jewelry business offices while armed, admission into evidence of the money and jewelry taken from defendant when he was arrested was not abuse of discretion, in view of fact that custody was established showing that such items had been taken from defendant and that a second defendant identified the property being carried by first defendant as the jewelry business' property. D.C.Code 1981, §§ 22–1801, 22–3202.

10. Criminal Law ⇐438(8), 438.1

In proceeding in which defendants were convicted of second-degree burglary while armed, admission of tape recording of prearrest negotiations and videotape of arrest scene was not abuse of discretion due to fact that the tapes were potentially highly prejudicial, in view of fact that the tapes had some probative value, at least as corroborative evidence, that their actual prejudicial impact was probably minimal and that trial judge gave a cautionary instruction to jury. D.C.Code 1981, §§ 22–1801, 22–3202.

11. Criminal Law ⇐1166(1)

Though trial court has discretion to apply sanctions for Government's withholding evidence until trial, reversal is warranted only where there is error which has substantially prejudiced defendant's rights. Criminal Rule 16.

12. Criminal Law ⇐627.8(6)

In criminal proceeding, even if Government's failure to disclose tape recording of prearrest negotiations and videotape of arrest scene to defense counsel in advance of trial violated discovery rule, violation would not have rendered admission of the tapes into evidence an abuse of discretion, in view of fact that the tapes' actual prejudicial impact was probably minimal, that defense counsel could have requested a recess to hear and view the tapes, that there was confusion as to whether a request for discovery had been made and that Government had only recently obtained the videotape. Criminal Rule 16.

Charles S. Carroccio, Jr., Washington, D.C., appointed by this court for appellant Hines.

Barbara R. Miller, Public Defender Service, with whom William J. Mertens, Public Defender Service, Washington, D.C., was on the brief, for appellant McIlwain.

Thomas P. Murphy, Asst. U.S. Atty., Washington, D.C., with whom Stanley S. Harris, U.S. Atty., John A. Terry, Asst. U.S. Atty., Washington, D.C., at the time the brief was filed, and F. Joseph Warin, Asst. U.S. Atty., Washington, D.C., were on the brief, for appellee.

Edward Gross, appointed by this court, for appellant Lee.

Before NEWMAN, Chief Judge, and KERN and BELSON, Associate Judges.

KERN, Associate Judge:

Appellants challenge their convictions of second degree burglary while armed, D.C. Code 1981, §§ 22-1801, -3202, upon grounds, primarily, 1) that a mistrial should have been ordered when it appeared that one of the jurors was probably under the influence of alcohol during a part of the deliberations, and 2) that the trial judge erred in not making adequate inquiry into that juror's competence and the extent of the alleged insobriety. Finding no error, we affirm the convictions.

I

On December 18, 1980, the three appellants, armed with a gun, entered the offices of A.D.E., Inc., ("ADE"), a gold and silver jewelry business, and took $6000 cash and a large amount of jewelry from the operator, Allen Danneman, and an ADE employee, Lori Greenstein. Appellant Hines was arrested later that same day with $6000 cash, a collection of jewelry, and an imitation starter pistol in his coat and in a bag he had been carrying. Appellants Lee and McIlwain were arrested later that day, after police officers had surrounded the house they were in and had conducted negotiations by telephone for their surrender.

At trial, the appellants conceded that they had entered the offices of ADE on the date in question and removed the property alleged to have been stolen. However, they asserted in defense that Danneman and Greenstein had consented to the "robbery" of ADE and had, in fact, hired the three of them (for $2000 apiece plus a quantity of jewelry) to stage the robbery as part of an insurance fraud scheme.

Trial had commenced in the Superior Court on July 22, 1981. On July 30, 1981, testimony was completed, closing arguments were heard, and the case was submitted to the jury late in the day. The jury deliberated for less than an hour that evening and were instructed to reassemble in the jury room by 9:15 the following morning. At approximately 10:20 the next day, Friday, the trial judge received a note from the jury stating that they "would like to change the foreperson of the jury due to the fact that the present foreperson seems somewhat unable to preside this morning." (Record at 1088.) The judge remarked at that point that his chambers had received a telephone call earlier that morning indicating that a juror (the foreperson) would be late. (Record at 1089.) Shortly thereafter, the judge stated that the marshal had indicated there might be a question as to whether or not that juror was intoxicated. (Record at 1091.)

The judge then held a separate *voir dire* of each member of the jury, beginning with the foreperson, who denied that she had been drinking, stated that she did not feel ill, and suggested that the note from the jury may have been prompted by her "a little bit too straightforward" personality. (Record at 1093–96.) Of the other jurors, nine stated their belief that the jury foreperson had been (variously) "a little intoxicated," "drinking," "under the influence of some kind," or "drunk." (Record at 1102–1117.) However, one juror stated that there was no indication that the jury foreperson had been drinking. (Record at 1100.) In response to questions concerning the foreperson's conduct in deliberations the day before and during the course of the trial, only two jurors stated a belief that the foreperson may have been drinking or

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Cite as, 434 A.2d 773 (D.C.App. 1982)

intoxicated at any earlier time. Most of the jurors indicated that they had seen no evidence that the foreperson had been intoxicated the previous afternoon. However, several of the jurors stated their displeasure with the jury foreperson's overbearing personality during deliberations, suggesting that she had been "rude" and "unreasonable." (Record at 1088 and 1100.)

At the conclusion of the *voir dire*, the trial judge suggested that the appellants consider dismissing the foreperson and submitting the case to the remaining eleven jurors. Appellants decided against that course of action and instead moved for a mistrial. The court denied the motion, but ordered an immediate three-day recess for the weekend, stating a "hope" that the "offending juror [would be] perfectly sober and able to deliberate" on Monday morning. (Record at 1120.) The trial judge expressly asked the jury foreperson to "come back on Monday refreshed." (Record at 1127.) He said further that, when the jury reassembled on Monday morning, he would ask them to come into court, so that he could observe their demeanor to be assured that they were able to deliberate. (Record at 1124–25.) It is not disputed that the judge did look in on the jurors on Monday morning before they resumed deliberations and that he told counsel that he saw no disabilities. The jury then resumed deliberations with no further complaints or incidents.

Aside from the motion for a mistrial, which was denied, the appellants made no specific contemporaneous objections to the course of action taken by the trial court—the declaration of a recess, with the trial judge stating his intention to observe the jury's appearance prior to the resumption of deliberations. Nor had appellants objected to the scope of the court's inquiry into the problem of possible intoxication of the foreperson.

1. The government argues that the evidence did not establish that the jury foreperson had been drinking. However, there were significant indications of an intoxication problem, and they prompted the trial court's action in ordering a recess. We will assume that the jury foreperson was, as the trial judge stated, "somewhat under the influence in a fashion . . . that makes deliberations . . . inappropriate at this time." (Record at 1119.)

II

Appellants argue that the trial court erred in denying their motion for a mistrial on the basis of the apparent insobriety of the jury foreperson.[1] Appellants' argument amounts to a proposal for a per se rule that, whenever there are strong indications either of the use of intoxicating liquor by a juror, or of a juror's intoxication, during the course of jury deliberations, a mistrial is warranted.

However, in other cases involving similar allegations of misconduct this court has declined to adopt such a rule but has, instead, required a showing of some reasonable ground to suspect that the defendant was prejudiced by the behavior in question. *E.g., Nelson v. United States*, D.C.App., 378 A.2d 657 (1977). In the *Nelson* case, where it was argued that a juror's temporary absences from the deliberations had deprived the defendants of their right to a trial by jury, we noted that juror misconduct will not be tolerated if it has resulted in "*substantial prejudice*" to a defendant. *Id.* at 660 (emphasis added). We held in that case:

> . . . not every irregularity in a juror's conduct compels reversal. The dereliction must be such as to deprive the defendant of the continued, objective, and disinterested judgment of the juror, thereby foreclosing the accused's right to a fair trial. [*Id.* (citations omitted).]

[1] The showing of prejudice which we have required achieves a balance of the important competing interests at stake.[2]

2. The federal courts of appeals for the Third and Fourth Circuits have also imposed requirements of a showing of prejudice in similar cases. *See United States v. Provenzano*, 620 F.2d 985, 987 (3d Cir.), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 129 (1980) (smoking of marijuana during the course of trial does not require new trial absent showing of prejudice; is not prejudicial as a matter of law); *United States v. Taliaferro*, 558 F.2d 724,

On the one hand is the right of the accused to have the charges against him or her fairly and competently considered, and the need to maintain public confidence in, and respect for, the integrity of the jury system. On the other hand are the interests of the parties in having the matter timely resolved, the need to avoid unnecessarily ordering new trials, at great expense of judicial resources, when there is no serious reason to believe that the accused has *not* had a fair and competent jury; and the dangers of the court's becoming excessively involved in, or exerting pressure upon, the jury's deliberative process. We will therefore adhere to the requirement of a showing of prejudice in the instant case.[2]

[2] We conclude, further, that in the present case there is no serious reason to believe that the appellants were prejudiced by the jury foreperson's apparent inappropriate behavior. The jury deliberated for less than an hour on Thursday afternoon, during which time the evidence suggests that the foreperson was able to preside. There is insubstantial evidence that the jury foreperson was drinking earlier in the course of the trial or was more than simply overbearing prior to the second day of deliberations. On Friday morning, the foreperson was late arriving, but the jury was assembled for little more than an hour (from 9:15 until 10:20), during which time it appears they focused their attention on the selection of a new foreperson. It is thus doubtful that any significant deliberations occurred on Friday morning. As soon as the problem was brought to the court's attention, the *voir dire* was held and a recess was ordered; and on Monday morning, the trial judge concluded that the juror was sober and competent to consider the case before he permitted the jury to resume deliberations.

During this whole process, only one juror was involved and only a short period of the deliberations was called into question. There is no evidence that any drinking actually occurred in the jury room or during the course of the trial, and the jury foreperson was not conclusively shown to have been intoxicated at the time of *voir dire*. The recess, coupled with the judge's checking in on the jury on Monday, both of which were done with the concurrence of appellants' counsel, foreclosed the possibility of prejudice. Under these circumstances, it cannot reasonably be said that the appellants were substantially deprived of their right to the judgment of objective and competent jurors.

[3] We now turn to appellants' second contention, that the trial court erred in not conducting a more extensive inquiry into the jury foreperson's competence to deliberate.

Before the trial judge held the *voir dire*, he consulted with counsel. When he conducted the *voir dire*, he questioned the jury foreperson directly concerning her capacity to deliberate, and at that point he had an opportunity to observe her demeanor. He then asked the other jurors on the panel specifically whether they believed the jury foreperson was experiencing any problems, such as drinking, which interfered with her capacity to function as a juror. He consulted with counsel again after the *voir dire* was completed. At no point before, during, or after the *voir dire* did appellants' counsel

726 (4th Cir.1977), cert. denied, 434 U.S. 1016, 98 S.Ct. 734, 54 L.Ed.2d 761 (1978) (showing of prejudice required when new trial sought because jurors drank alcoholic beverages during dinner recess).

2. This requirement is consistent with the National District Attorneys Association's National Prosecution Standards and with the American Bar Association's Standards for Criminal Justice, which suggest that a jury verdict should be impeached only when a juror has been intoxicated during deliberations "to such an extent as to interfere with the capacity to reach a verdict." *See* ABA, Standards for Criminal Justice 15-4.7 (2nd ed. 1980), commentary at 162, quoting NDAA, National Prosecution Standards 17.19(D) (1977), commentary at 286. The court in *State v. Tatlow*, 34 Kan. 80, 8 P. 267 (1885), cited in appellant Hines' brief, imposed the same requirement of a showing of prejudice on facts similar to those of the instant case.

object to the extent of the trial judge's questioning, or ask that he probe further into the situation, or request an opportunity to question the jurors themselves. Counsel, in effect, acceded to the scope of the inquiry. Considering that a full *voir dire* was held, that the court consulted with counsel and thus provided them with an opportunity to offer suggestions and express any concerns or dissatisfaction regarding his approach to the problem, and that preventive measures were available and were taken to avoid prejudice to the appellants, the trial judge's decision not to conduct a more detailed inquiry, *sua sponte*, was in our view not error. We conclude that the inquiry made was appropriate to the circumstances of this case.

III

Appellants argue as an additional ground for reversal that the trial court improperly limited the evidence concerning certain uncharged criminal conduct of ADE, Allen Danneman, and Lori Greenstein. Appellants contend that they should have been allowed to elicit testimony showing that these complainants were the focus of a federal criminal investigation for racketeering and "fencing" stolen goods. They argue that such evidence would have been relevant to their defense of consent because it would have established that the victims had a reason to hire the appellants to stage a robbery of ADE, *i.e.*, to launder "hot" jewelry.

[4–6] The law generally disfavors the admission of evidence of other crimes or misconduct to prove the character of a person to show that he acted in conformity therewith on the occasion in question. *See* McCORMICK ON EVIDENCE § 190 (E. Cleary ed. 1972); Fed.R.Evid. 404(b); *Drew v. United States*, 118 U.S.App.D.C. 11, 15, 331 F.2d 85, 89 (1964). *E.g., McLean v. United States*, D.C.App., 377 A.2d 74, 77 (1977). Although evidence of prior misconduct of an accused may be introduced for certain limited purposes, such as to establish motive or intent, a witness other than the accused may be asked about prior misconduct, not amounting to a criminal conviction, only if it bears directly upon the veracity of the witness as to the issues involved in the trial. *Kitchen v. United States*, 95 U.S.App.D.C. 277, 279, 221 F.2d 832, 834 (1955), *cert. denied*, 357 U.S. 928, 78 S.Ct. 1378, 2 L.Ed.2d 1374 (1958). Even under those circumstances, the trial judge must balance the prejudicial effect of the proffered evidence against its probative value in determining whether to admit it. *Wooten v. United States*, D.C.App., 285 A.2d 308, 309 (1971); *United States v. Gay*, 133 U.S.App.D.C. 337, 339, 410 F.2d 1036, 1038 (1969), *cert. denied*, 400 U.S. 867, 91 S.Ct. 109, 27 L.Ed.2d 107 (1970). The trial court, within its discretion, may exclude the proffered evidence if it appears that the danger of unfair prejudice will outweigh its probative value; and that determination is reversible only for abuse of discretion. *Brown v. United States*, D.C.App., 409 A.2d 1093, 1099–1100 (1979).

[7] In the instant case, the prejudicial impact of the proffered evidence is substantial: from evidence that the victims of the alleged burglary were themselves under criminal investigation, the jury would be permitted to infer that the victims had the kind of bad character which would make it likely that they had planned a staged robbery to defraud their insurers. On the other hand, the probative value of the evidence would not have been great: appellants' theory of relevance is somewhat tenuous, that the prior misconduct of ADE, involving stolen goods, would show that ADE planned the robbery in order to launder stolen jewelry. Moreover, the proffered evidence does not bear directly on the truthfulness of witnesses at trial. For these reasons, we conclude that there was no abuse of discretion on the part of the trial court in restricting the evidence concerning the prior misconduct of ADE, Danneman, and Greenstein. Further, we note that the appellants were not prejudiced by the trial court's ruling to this effect, since they were ultimately successful in getting much of the evidence before the jury nonetheless.

[8, 9] Finally, appellants raised another issue in their briefs, which was not dis-

cussed at oral argument.[4] They contend that a tape recording of the prearrest negotiations and a videotape of the arrest scene were improperly admitted into evidence because they were unfairly prejudicial and because they had not been disclosed in advance to defense counsel.

[10] Both tapes were potentially highly prejudicial, permitting the inference that appellants were extremely dangerous and the inference that they were guilty simply because they refused to submit to arrest immediately. However, because the tapes had some probative value, at least as corroborative evidence, because their actual prejudicial impact was probably minimal (since the tapes were cumulative of other evidence), and because the trial judge gave a cautionary instruction to the jury, (Record at 1077–78), we conclude that the trial judge did not abuse his discretion in admitting the tapes despite their possible prejudicial effect.

[11, 12] Regarding the failure of the government to disclose the tapes to defense counsel in advance of trial, appellants rely upon Super.Ct.Cr.R. 16, which allows a defendant to discover his own recorded statements and real evidence, such as the videotape, which is within the government's custody. Assuming that the appellants had made a proper request for all such discoverable materials (which the government disputes), and assuming that late disclosure in the instant case did violate the requirements and purposes of Rule 16, the trial court had discretion to apply sanctions for the government's withholding evidence until trial. *See Lee v. United States*, D.C.App., 335 A.2d 159, 163 (1978). Reversal is warranted, however, only where there is error which has substantially prejudiced appellants' rights. *Id.* at 164. In light of our holding that the tapes themselves were not unfairly prejudicial, considering that defense counsel could have requested a recess to hear and view the tapes before they were played to the jury, but did not do so, and bearing in mind both that there was confusion as to whether a request for discovery had been made and that the government had only recently obtained the videotape, we conclude that the trial judge did not abuse his discretion in admitting the tapes into evidence.

In sum, the trial court committed no reversible error in any alleged respect.

Affirmed.

4. Appellant Hines argues two additional errors. He asserts that the trial court erred in denying his motion for acquittal and in admitting into evidence the money and jewelry taken from him when he was arrested. On the latter point, he argues that the money and jewelry were never properly identified as belonging to ADE. We reject both contentions. There was ample circumstantial evidence linking appellant Hines to the events which occurred at the ADE offices on the date in question, and there is evidentiary support for each element of the offense of which he was convicted. *See Jennings v. United States*, D.C.App., 431 A.2d 552, 555 (1981); *Frendak v. United States*, D.C.App., 408 A.2d 364, 370–71 (1979); *Williams v. United States*, D.C.App., 357 A.2d 865, 867 (1976). Appellant has failed to show, as required for a reversal on grounds of insufficient evidence, that "the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt." *Frendak*, *supra* at 371. Likewise, there was no abuse of discretion in the admission of the money and jewelry taken from Hines upon his arrest, since a chain of custody was established showing that those items had been taken from Hines, and since his codefendant Lee identified the property Hines had been carrying as ADE property.

In the Matter of the Petition of R.M.G. and E.M.G.

Appeal of J.H., Jr., et al.

No. 79–747.

District of Columbia Court of Appeals.

Argued Jan. 29, 1981.

Decided Dec. 29, 1982.

White foster parents of black child and the child's black paternal grandparents pe-

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APPENDIX B

District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

FILED MAR 30 1983

Clerk

No. 81-1300
LARRY T. LEE, Appellant, F 7141-80

No. 81-1379
ALVIN C. HINES, Appellant, F 7140-80

No. 81-1390
JOHN P. McILWAIN, JR., Appellant, F 7139-80

v.

UNITED STATES, Appellee.

BEFORE: *Newman, Chief Judge; Kelly, *Kern, Nebeker, Mack, Ferren, Pryor, *Belson, and **Terry, Associate Judges.

ORDER

On consideration of appellants' petitions for rehearing and rehearing en banc, it is

ORDERED by the merits division that the petitions for rehearing are denied. It appearing that no judge of this court has called for votes thereon, it is

FURTHER ORDERED that appellants' petitions for rehearing en banc are denied.

PER CURIAM

Copies to:

Honorable Fred B. Ugast

Clerk, Superior Court

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*Denotes merits division.
**Associate Judge Terry has recused himself from participation in this matter.